Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-895

In the Supreme Court
of the United States

OCTOBER TERM, 1987

WILLIAM H. HEDLUND, et al.,

Petitioners,

v.

ELSIE VIOLA MILLER, et al.,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS M. TRIPLETT*
DAVID W. AXELROD
PATRICIA ANN HAIM
SCHWABE, WILLIAMSON & WYATT
1600-1800 Pacwest Center
1211 S.W. Fifth Avenue
Portland, Oregon 97204-3795
Telephone: (503) 222-9981
Attorneys for Respondents

* Counsel of Record

STEVENS-NESS LAW PUBLISHING CO., PORTLAND, OR. 97204 881

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit correctly held that regulations of the Oregon Liquor Control Commission which authorize an exchange of price information and result in price stabilization among private parties constitute a per se violation of the antitrust laws?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Authorities iv

Statement of the Case 2

1. Factual Foundation of the Decision Below 4

2. The Ninth Circuit's Decision 13

Summary of Argument 17

Reasons for Denying the Writ of Certiorari 18

1. The Decision Below Rests on Its Particular Facts, Which Establish that the Challenged Regulations Compel Conduct that is a Per Se Violation of Federal Antitrust Law 18

2. The Ninth Circuit Correctly Applied This Court's Precedents ... 20

A. On the Present Facts, the Challenged Regulations Mandate a Hybrid Restraint on Competition 21

B. Having Found that the Challenged Regulations Impose a Hybrid Restraint, the Ninth Circuit Correctly Concluded that Separate Concerted Activity Among the Wholesalers Need Not be Shown to Establish that the Regulations are Preempted 25

3. There Is No Conflict With Any Decision After Fisher 27

Conclusion 33

Appendix

Excerpt of Memorandum of the Attorney General of Oregon .... App. 1

Excerpt of Oregon Attorney General's Report, March 2, 1978 ..... App. 12

Excerpt of Staff Sunset Review ..... App. 17

TABLE OF AUTHORITIES

Page

Cases

Admiral Wine & Liquor Co. v. State Liquor Authority, 89 A.D.2d 522, 452 N.Y.S.2d 213 (1982), rev'd, 61 N.Y.2d 858, 462 N.E.2d 146 (1984) 30,31

Battipaglia v. New York State Liquor Authority, 583 F. Supp. 8 (S.D.N.Y. 1982), aff'd, 745 F.2d 166 (2d Cir. 1984), cert. denied, 470 U.S. 1027 (1985) ..... 28, et passim

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ..... 15, et passim

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) 14,21

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 26

Enrico's, Inc. v. Rice, 551 F. Supp. 511 (N.D. Cal. 1982), vacated as moot, 730 F.2d 1250 (9th Cir. 1984) 31-32

Fisher v. City of Berkeley, 475 U.S. 260 (1986) ..... 15, et passim

Intercontinental Packaging Co. v. Novak, 348 N.W.2d 330 (Minn. 1984) 30,32

Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board, 136 Cal. App. 3d 829, 186 Cal. Rptr. 552 (1982), cert. denied, 464 U.S. 863 (1983) 29

Miller v. Oregon Liquor Control Comm'n, 42 Or. App. 555, 600 P.2d 954 (1979), rev. denied, 288 Or. 493 (1980) 8

Miller v. Oregon Liquor Control Comm'n, 688 F.2d 1223 (9th Cir. 1982) 16

Parker v. Brown, 317 U.S. 341 (1943) ..... 3, et passim
Rice v. Norman Williams Co., 458 U.S. 654 (1982) ..... 20, et passim
Serlin Wine & Spirit Merchants, Inc. v. Healy, 512 F. Supp. 936 (D. Conn.), aff'd sub nom. Morgan v. Division of Liquor Control, 664 F.2d 353 (2d Cir. 1981) 32
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 15,22,26,31
Sugar Institute v. United States, 297 U.S. 553 (1936) 13,20,21
324 Liquor Corp. v. Duffy, ___ U.S. ___, 107 S. Ct. 720 (1987) 26
Wine & Spirits Specialty, Inc. v. Daniel, 666 S.W.2d 416 (Mo.), app. dismissed, 469 U.S. 802 (1984) 30,32

Federal Statutes

15 U.S.C. § 1 (1973) ..... 13, et passim
28 U.S.C. § 2101(c) (1982) 16

State Statutes and Regulations

Or. Rev. Stat. § 471.005 (1987) 8
Or. Rev. Stat. §§ 646.010-646.180 (1987) 17
Or. Rev. Stat. Ch. 842 (1987) 12
Or. Admin. R. 845-06-090 (1987) 2-3,6
Or. Admin. R. 845-10-210 (1987) 2-3,6

Other Authorities

Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L.J. 486 (1987) 26

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-895

WILLIAM H. HEDLUND, et al.,
Petitioners,

v.

ELSIE VIOLA MILLER, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Elsie Viola Miller and Oretta Bernice Lancaster, dba the Junction Cafe and Tavern; Taylor's Coffee Shop, Inc., dba Rennie's Landing; WIAN, Inc., dba Barney's Cable,[1] individually and as representatives of others similarly situated ("respondents"), submit this brief in opposition to the Petition for Writ of Certiorari to the Ninth Circuit Court of

---

[1]Named corporate respondents have no parent, subsidiary, or affiliate corporations.

Appeals of the Administrator and Commissioners of the Oregon Liquor Control Commission of the State of Oregon ("petitioners" or "OLCC"), and the brief in support of the Petition submitted by Coast Distributors, Inc. ("Coast"), one of the named private defendants below.

STATEMENT OF THE CASE

Respondents agree generally with petitioners' statement of the history of this very old, much-reviewed case.[2] They supplement petitioners' statement of the case in order to place the opinion below in better perspective.

The decision at issue, Petition, Appendix A, is not the product of an abstract, disembodied challenge to certain regulations of the OLCC. Or. Admin.

---

[2]Respondents take no exception to petitioners' list of the parties to the proceeding below; citations to the opinions and judgments below; statement of the grounds for invoking this Court's jurisdiction; and selection of the constitutional, statutory, and regulatory provisions involved in this case.

R. 845-06-090 & 845-10-210 (the "challenged regulations"). It rests on an extensive evidentiary record which demonstrates that the challenged regulations contemplate, authorize, and put irresistible pressure on Oregon's beer and wine wholesalers to engage in a price exchange and price stabilization scheme. The Ninth Circuit properly concluded that this arrangement is in irreconcilable conflict with federal antitrust law, and that it is not shielded by the state action doctrine of Parker v. Brown, 317 U.S. 341 (1943).

This is no abstract decision. It is instead a narrow, fact-specific ruling which reaches only the peculiar hybrid price stabilization arrangement that subsists between the OLCC and its licensee beer and wine wholesalers. The decision does not reach any other state's liquor regulations.

1. Factual Foundation of the Decision Below

Between 1978, when respondents first filed their claims in the United States District Court for the District of Oregon, and 1984, when this case was submitted for decision to the Ninth Circuit, respondents conducted extensive discovery in both the public and private sectors. The result is a vast body of evidence, the essential points of which are not contested. The evidence detailed for the appeals court the concrete ways in which the challenged regulations contemplate and sustain a price stabilization scheme for wholesale beer and wine prices in Oregon.

Respondents presented to the Ninth Circuit the testimony of OLCC policy-makers and senior OLCC administrative, information, and enforcement officers; testimony of licensed beer and wine wholesalers; a petition by the Oregon Attorney General to amend the challenged

regulations; reports of the Oregon Department of Justice and the Oregon Attorney General; the staff Sunset Review report; a management study of the OLCC; and extensive additional evidence.

This evidence provides the basis for the Ninth Circuit's fact-specific conclusion that the challenged regulations mandate a price exchange and price stabilization scheme among beer and wine wholesalers, in per se conflict with federal antitrust law. The same evidence establishes that the State of Oregon does not actively supervise the price restraint imposed by the challenged regulations.

The challenged regulations on their face require beer and wine wholesalers to engage in the following conduct as a condition of their license:

1. Publicly post (and thereby publish and exchange) present and future prices, and commit to selling at only the posted price;

2. Observe significant, artificial restrictions on price reductions; and

3. Agree to post, exchange, and charge only readily-comparable delivered prices.

Or. Admin. R. 845-06-090, 845-10-210.

The evidence on which the Ninth Circuit's decision rests delves beneath the regulations' bland surface. Testimony from both the public and private sectors establishes that in practice, the challenged regulations mandate a price exchange and stabilization scheme whose operation and enforcement depend on the conduct of individual, competing wholesalers. Specifically, it is not disputed that:

- All licensees set their wholesale beer and wine prices observing the constraints of the challenged regulations.

- All licensed wholesalers providing testimony below utilize the price exchange features of the challenged regulations to review their competitors' pricing when they "individually" set their own prices.
- The OLCC acknowledges that no wholesaler would independently adopt these pricing restrictions without knowledge that all other competing licensees would do likewise.

The evidence further establishes that the OLCC, for its part:

- Devotes significant resources to facilitating the public exchange features of the price postings;
- Recognizes that wholesale licensees regularly and consistently utilize the OLCC's facilities to review competitors' current and future prices;
- Relies on the private wholesalers' use of the challenged regulations' price

exchange feature to police a critical price restraint -- selling at only the publicly exchanged price.

Petitioners and the private defendants below did not contest respondents' evidence that the challenged regulations' price exchange mechanism results in the stabilization and artificial inflation of wholesale beer and wine prices in Oregon.

Throughout this protracted litigation in the federal and state courts, the OLCC said it did not know what provisions of its enabling legislation (the Oregon Liquor Control Act ("OLCA"), Or. Rev. Stat. §§ 471.005, et seq.) the challenged regulations were intended to further or achieve.[3]

---

[3]In Miller v. Oregon Liquor Control Comm'n, 42 Or. App. 555, 560, 600 P.2d 954, 957 (1979), rev. denied, 288 Or. 493 (1980), the Oregon Court of Appeals concluded that the OLCC was not required to consider the anticompetitive effect or purpose of regulations which it adopts pursuant to the OLCA. The court refused to consider whether the challenged regulations conflict with federal antitrust policy.

In fact, the evidence was unanimous that the purpose and effect of the challenged regulations contravenes federal antitrust law. In its memorandum in opposition to plaintiffs' motion for summary judgment, the OLCC itself admitted that the regulations limit wholesale beer and wine "price fluctuations" and competition via "short term price changes." The only justification which the Oregon Beer and Wine Distributors' Association offered below in support of the regulations was that price posting was needed "to maintain stability in the market." See also App. 15, 16.

Most tellingly, both the legislative and executive branches of the State of Oregon have repeatedly criticized these regulations for their improper, anticompetitive purpose and effect.

The Attorney General of Oregon petitioned the OLCC in 1976 to amend its price posting and quantity discount

regulations in order to eliminate their anticompetitive effect. As part of this proceeding, the Oregon Department of Justice carefully analyzed the authority, purpose, and effect of the OLCC's rules. App. 1-12. It concluded that the OLCC's price posting rule lacks any legislative authority, and that it mandates a violation of federal antitrust law:

> The existing price posting rule is designed to give wholesalers a 10 day period in which to react to their competitors' publicly announced pricing intentions. As a practical matter this permits a wholesaler to announce a price change and then retreat if his competitors do not follow suit. By this means wholesalers can "agree" on future prices without meeting or discussing prices.

App. 5. The Oregon Attorney General and Department of Justice recommended that the OLCC substitute price reporting for price posting and allow uniform, cost-based quantity discounts, such as are permitted under federal law. See App. 10.

Two years after its petition, the Oregon Attorney General completed an extensive investigation of the OLCC. He concluded that the OLCC lacked statutory authority to control wholesale wine and beer prices, and that there was no public health or safety justification for the challenged regulations. App. 12-16. The report continued:

> [N]evertheless the agency has adopted a number of rules designed purposely to raise and stabilize wholesale wine and beer prices.

App. 12. The Attorney General pointed to the advance price posting and post-off rules and the prohibition of quantity discounts as the OLCC's primary price stabilizing devices.

The Attorney General identified the moving force sustaining these rules as wholesalers who have profited from this shelter from a free marketplace:

> But a closer look reveals that the pressure to retain these rules comes not from people

> concerned with public health and safety, but from established businessmen concerned with profits who want "stabilized" prices and protection from "price wars." There is clearly a cost to the consumer and a benefit to the sellers of this reduced price competition.

App. 16.

During the same period, the Legislative Research office conducted an extensive, nonpartisan investigation into the OLCC for the Legislative Assembly pursuant to Oregon's "sunset" law. Or. Rev. Stat. Ch. 842. App. 17-20. The report recommended a thorough reordering of the OLCC's structure and policies, including the elimination of its anticompetitive rules. In particular, the Legislative Research report concluded:

> Certain laws and regulations [of the OLCC] impede competition beyond a level necessary for control of the industry and protection of the public health, safety, and welfare. This restriction of competition is accomplished in three ways: (1) the state liquor monopoly, (2) anticompetitive licensing

> criteria, and (3) price posting rules.

App. 18. It, too, recommended the repeal of the challenged regulations. App. 20.

2. The Ninth Circuit's Decision

The foregoing is only a sampling of the extensive factual background which the Ninth Circuit had before it. In ruling on respondents' motion for summary judgment, the Ninth Circuit found that there was no genuine issue of material fact. The challenged regulations do contemplate the exchange of price information by private sellers, and they require adherence to the announced prices and terms of sale. This arrangement is a per se violation of the Sherman Act.[4] 15 U.S.C. § 1. Petition, App. 7-9, 16, relying on Sugar Institute v. United States, 297 U.S. 553 (1936); and

---

[4]The disingenuous assertion of Coast that the challenged regulations are needed "to preserve the honest and strong competition which exists in Oregon," Coast Brief, p. 16, flies in the face of these facts.

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (per curiam).

Having found that the challenged regulations mandate a result which is per se unlawful under federal antitrust law, the Ninth Circuit then turned to the argument made by petitioners and the private defendants below that there is no evidence of an agreement or concerted activity among the individual beer and wine wholesalers. The court emphasized the real-world operation of the OLCC regulations:

> [I]t cannot be ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices. In other words, the state compels activity that would otherwise be a per se violation of the Sherman Act.

Petition, App. 10.

Relying on this Court's precedents, the Ninth Circuit held that, on these facts, a separate showing of concerted activity by the wholesalers was not

required in order to find that the regulations are preempted. Petition, App. 10-13, following Fisher v. City of Berkeley, 475 U.S. 260 (1986); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); and California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ("Midcal"). The court held first that, as in Schwegmann, "[t]he mere fact that each wholesaler complies unilaterally with the regulations does not save an impermissible pricing scheme from an antitrust challenge." Petition, App. 13. Alternatively, the Ninth Circuit characterized the challenged regulations as a "hybrid" restraint, rather than a unilateral one, under which the OLCC allows the wholesalers to set, exchange, and stabilize their prices without reviewing the reasonableness of those prices. Id.

The Ninth Circuit rejected petitioners' claim that even though the challenged regulations effect a per se

violation of federal antitrust law, they are immunized from preemption under the state action doctrine. Petition, App. 14-15. While the court left open the question of whether it was technically bound by the law of the case doctrine, it found no reason to depart from its earlier holding in this same case. It noted that "[t]here have been no material changes in Oregon's regulations scheme since Miller II."[5] Petition, App. 14-15. See Miller v. Oregon Liquor Control Comm'n, 688 F.2d 1223, 1226-27 (9th Cir. 1982). In this earlier proceeding, the Ninth Circuit held that the regulations fail the second prong of the test set out in Midcal, 445 U.S. at 105, because Oregon does not actively supervise the resulting pricing restraint. Petition, App. 14-15.

The essential evidence is uncontested

---

[5]Thus the decision that the challenged regulations are not immune from preemption under Parker v. Brown is no longer available for review. 28 U.S.C. § 2101(c).

that Oregon does not actively supervise the restraint. The OLCC does not establish the wholesalers' prices. It does not conduct investigations or hearings or otherwise review the reasonableness of these prices. It has never monitored market conditions or investigated the effect of its regulations on wholesalers' prices or pricing practices. It has never investigated the alleged market conditions to which it claims the regulations are addressed.[6]

The Ninth Circuit found no need to reach the first prong of Midcal, and it remanded the twenty-first amendment issue.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision depends upon unique facts which were demonstrated in an extensive record below. This record

---

[6]Petitioners' argument that the challenged regulations are necessary to prevent beer and wine distributors from offering preferential prices to certain customers, Petition, p. 11, lacks any merit. Oregon has an express anti-price discrimination law. Or. Rev. Stat. §§ 646.010-646.180.

establishes that the OLCC's scheme contemplates that individual, private wholesalers will use the public posting mechanism and attendant rules to exchange and stabilize prices. On these facts, the court below correctly applied this Court's precedents to conclude that the challenged regulations create a hybrid restraint on competition, in per se conflict with federal antitrust law.

The decision below is not one of broad or abstract applicability, so it casts no shadow on other states' regulatory structures. Furthermore, it does not conflict with any case that was decided after Fisher v. City of Berkeley.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Decision Below Rests on Its Particular Facts, Which Establish that the Challenged Regulations Compel Conduct that is a Per Se Violation of Federal Antitrust Law.

The court below reviewed the extensive evidentiary record de novo. Petition,

App. 7. It found that the challenged regulations operate in situ to compel and enable conduct among the wholesalers which under all circumstances is in irreconcilable conflict with federal antitrust law. Petition, App. 8-10. The court below did not rule in the abstract on the anticompetitive effect of a generic price-posting regulation. Instead, it examined evidence of the concrete conduct which the challenged regulations contemplate and foster.

The Ninth Circuit correctly found no genuine issue concerning the fact that under the challenged regulations' mandate, all wholesale competitors engage in the following conduct: they post, and thereby publish and exchange, their present and future prices; they sell only at the exchanged price; they post, exchange, and charge only delivered prices to facilitate ready comparison; and they "individually" set prices within this pricing scheme.

This scheme is identical to the conduct which this Court found to be a per se violation of § 1 of the Sherman Act in Sugar Institute v. United States, supra, 297 U.S. 553.[7] The only difference between the conduct in the present case and that in Sugar Institute (a case significantly absent from petitioners' and Coast's discussions), is the presence of facilitating state regulations.

2. The Ninth Circuit Correctly Applied This Court's Precedents.

Under the rule established in Rice v. Norman Williams Co., a state regulation will be condemned under § 1 of the Sherman Act "when the conduct contemplated by the statute is in all cases a per se violation." 458 U.S. 654, 661 (1982). The record in this case establishes that the conduct contemplated by the challenged

---

[7]The challenged regulations, in addition, impose arbitrary penalties on price reductions and thereby further discourage price competition and stabilize prices at upward levels.

regulations amounts to a price exchange and price stabilization scheme among competitors. As a matter of law, this scheme is per se unlawful. Sugar Institute v. United States, supra, 297 U.S. 553; Catalano, Inc. v. Target Sales, Inc., supra, 446 U.S. 643.

A. On the Present Facts, the Challenged Regulations Mandate a Hybrid Restraint on Competition.

The court below held, in the light of the actual demonstrated conduct, that the challenged regulations mandate a hybrid restraint on trade. Petition, App. 10-13. Petitioners argue instead that the regulations are a purely unilateral, public restraint which is not reached by § 1 of the Sherman Act. Petitioners would have the Court turn a blind eye to the concrete facts of this case: The challenged regulations "compel activity" by private parties "that would constitute a per se violation of the Sherman Act." Petition, App. 16.

The Court recently restated the test for distinguishing between public and hybrid restraints on competition:

> Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. See Rice v. Norman Williams Co., 458 U.S., at 665 (STEVENS, J., concurring in the judgment). Where private actors are thus granted "a degree of private regulatory power," id., at 666, n. 1, the regulatory scheme may be attacked under § 1.

Fisher v. City of Berkeley, 475 U.S. at 267-68 (emphasis added).

In Fisher, the court held that Berkeley's rent control ordinance was a public restraint because it completely removed price-setting power from private landlords and gave it to the Rent Stabilization Board. 475 U.S. at 269. It contrasted Berkeley's public restraint with the hybrid restraints found in Schwegmann and Midcal. In those cases, the Court

analyzed as hybrid restraints Louisiana's and California's statutory schemes under which the states enforced minimum resale prices set by individual liquor and wine wholesalers. Id. at 268-69. In the present case, the Ninth Circuit correctly characterized the challenged regulations as a hybrid restraint because they empower individual wholesalers to set, exchange, stabilize, and police their prices.

The actual facts in the present case present a core example of a hybrid restraint. As the court below correctly held, the challenged regulatory scheme does not contemplate unilateral action by the OLCC. Instead, it "allows private parties to set the prices and [the state] does not review the reasonableness of those prices." Petition, App. 13. The wholesalers retain the private regulatory power to preview their competitor's prices, adjust their own accordingly, and police the regulations' price adherence term. The result is a

classic hybrid restraint, in violation of § 1.

The test articulated in Fisher is entirely adequate in the present, fact-specific case to distinguish between hybrid and public restraints. This case presents no profitable occasion for the Court to expend its resources to give "guidance" to Oregon or other states concerning the characterization of "hybrid" restraints, as petitioners urge.[8] The Ninth Circuit and the Oregon Department of Justice examined the actual operation of the challenged regulations and reached the correct conclusion: the challenged regulations

---

[8]Petitioners' argument that Oregon needs more guidance in order to "avoid resource-draining 'hybrid' regulatory schemes," Petition, pp. 9-10, is of no force. A purely public restraint on competition through unilateral action by a state governmental unit, e.g., setting prices, may entail significant expenditures of administrative time and money. See, e.g., Fisher v. City of Berkeley, supra, 475 U.S. at 262 (Rent Stabilization Board must set rents for approximately 23,000 units, adjust them annually, and determine individual petitions for adjustment).

mandate conduct that is in per se conflict with federal antitrust law.

B. Having Found that the Challenged Regulations Impose a Hybrid Restraint, the Ninth Circuit Correctly Concluded that Separate Concerted Activity Among the Wholesalers Need Not be Shown to Establish that the Regulations are Preempted.

Relying on Fisher v. City of Berkeley, the Ninth Circuit correctly held that once a restraint is identified as "hybrid," "the regulatory scheme itself may be attacked under § 1" without a separate showing of concerted activity by private parties. Petition, App. 13; 475 U.S. at 268-69.

Petitioners argue that the challenged regulations cannot be preempted because no separate agreement or concerted activity was shown among the wholesalers. This is simplistic, as the Ninth Circuit noted. Petition, App. 10. The Sherman Act preempts state laws which irreconcilably conflict with it, even if there is no separate "contract, combination, or

conspiracy" among the individual private regulatees. 324 Liquor Corp. v. Duffy, ___ U.S. ___, 107 S. Ct. 720 (1987); Midcal, supra, 445 U.S. 97; Schwegmann, supra, 341 U.S. 384; See also Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (city ordinance preempted, no agreement or conspiracy shown between city and plaintiff's competitor); Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L.J. 486, 502-07 (1987).

All parties agree that § 1 does not reach unilateral action by a state or an individual. But it does preempt hybrid combinations in which private parties are "granted 'a degree of regulatory power'" and regulatory mechanisms "merely enforce private marketing decisions." Fisher v. City of Berkeley, supra, 475 U.S. at 268. The facts below establish that the challenged regulations merely enforce the wholesalers' price exchange and

stabilization scheme. The Ninth Circuit correctly applied the rule of Fisher to hold that federal law preempts them.

3. There Is No Conflict With Any Decision After Fisher.

The decision below speaks to the unique factual situation created in Oregon by the challenged regulations. It rests on the line of cases, ending with Fisher, striking down hybrid restraints. The Ninth Circuit's decision does not conflict with any post-Fisher decision. Other courts' pre-Fisher rulings, which concern other states' liquor laws, do not create a genuine conflict.

The cases which petitioners and Coast urge as conflicting directly with the decision below do not. They must be distinguished on two primary grounds. First, these cases were all decided before Fisher v. City of Berkeley. They do not use the analysis of hybrid restraints which was available to the Ninth Circuit. They

incorrectly confine Midcal to its facts as a resale price maintenance case, and rely instead on Rice v. Norman Williams Co. Second, these cases concern abstract challenges to other states' price-posting laws. None of these cases presents a concrete situation in which regulations were found to contemplate the exchange and stabilization of prices by private parties.

In Battipaglia v. New York State Liquor Authority, 745 F.2d 166 (2d Cir. 1984), cert. denied, 470 U.S. 1027 (1985), the Second Circuit, in a split decision, upheld an abstract, facial attack upon a New York statute which requires liquor wholesalers to post prices and sell at those prices for 30 days. The statute does not single out price decreases for the imposition of penalty holding periods or require quotation of only delivered prices. Quantity discounts, though restricted, are not banned. No evidence was presented of the statute's actual effect on price

competition or whether the liquor authority relied upon private wholesalers to police their competitors' pricing conduct.

The majority made clear that its decision was predicated exclusively upon the theoretical ground that a price exchange statute, without more, is not per se unlawful. It expressly "le[ft] open the possibility of a challenge based upon its actual operation."[9] 745 F.2d at 175.

The majority in Battipaglia distinguished Midcal as a resale price maintenance case. It declined to decide whether a separate agreement had to be shown among the wholesalers to sustain a

---

[9]The majority implicitly distinguished its holding from Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board, 136 Cal. App. 3d 829, 186 Cal. Rptr. 552, 557 (1982), cert. denied, 1464 U.S. 863 (1983) (holding that California's price posting statute was preempted by § 1), on the ground that "the record show[ed] price posting to have had an anti-competitive effect." 745 F.2d at 172 (footnote omitted).

§ 1 violation. 745 F.2d at 173. It recognized:

> [T]here is some force in the argument that a statute compelling conduct which, in its absence, would permit the inference of an agreement under § 1 is inconsistent with that section unless saved by Parker v. Brown.

Id. The Court affirmed this line of reasoning in Fisher.

Judge Winter, writing in dissent in Battipaglia, anticipated Fisher when he noted that the case should not be determined by Rice v. Norman Williams Co. but by Midcal, which is not confined simply to resale price maintenance.[10] 745 F.2d at 179.

---

[10] See also Admiral Wine & Liquor Co. v. State Liquor Authority, 89 A.D.2d 522, 452 N.Y.S.2d 213, 214 (1982) (price posting statute preempted under Midcal), rev'd, 61 N.Y.2d 858, 462 N.E.2d 146 (1984); Wine & Spirits Specialty, Inc. v. Daniel, 666 S.W.2d 416, 422-24 (Mo.) (Blackman, J., dissenting) (same), app. dismissed, 469 U.S. 802 (1984); Intercontinental Packaging Co. v. Novak, 348 N.W.2d 330, 334 (Minn. 1984) (trial court relied on Midcal to hold that statute is preempted).

> The relevant issue under the supremacy clause has to do with the degree to which a state may bring about the very anti-competitive arrangements the Sherman Act was designed to avoid . . . . [T]he fact that the state compels a private cartel offers no reason to exempt the legislation from scrutiny under the supremacy clause.

Id.

The additional decisions cited by petitioners and Coast upholding other states' price-posting laws share the same limits as Battipaglia. They were all decided before Fisher. They all concern different statutory schemes. None of these cases tests the statutes in question as hybrid restraints.

In Admiral Wine & Liquor Co. v. State Liquor Authority, the court on appeal did not consider Schwegmann, improperly distinguished Midcal as a resale price maintenance case, and, like Battipaglia, relied instead on Rice v. Norman Williams Co.. 61 N.Y.2d 858, 462 N.E.2d 146, 147 (1984). The same is true of Enrico's, Inc.

v. Rice, 551 F. Supp. 511, 515 (N.D. Cal. 1982), vacated as moot, 730 F.2d 1250 (9th Cir. 1984); Serlin Wine & Spirit Merchants, Inc. v. Healy, 512 F. Supp. 936 (D. Conn.), aff'd sub nom. Morgan v. Division of Liquor Control, 664 F.2d 353, 355 (2d Cir. 1981); Wine & Spirits Specialty, Inc. v. Daniel, 666 S.W.2d 416, 418 (Mo.) (en banc), app. dismissed, 469 U.S. 802 (1984); and Intercontinental Packaging Co. v. Novak, 348 N.W.2d 330, 334-35 (Minn. 1984).[11]

Judge Winter's analysis in his dissent in Battipaglia is consistent with Fisher, and applies with equal force to the present case:

> The arrangement in question thus would be per se illegal if

---

[11]The alleged conflict between the Ninth Circuit and these decisions is moot in a majority of cases because the courts found that the statutes at issue are saved by Parker v. Brown. Battipaglia v. New York State Liquor Authority, 583 F. Supp. 8, 10 (S.D.N.Y. 1982), aff'd on other grounds, 745 F.2d 166 (2d Cir. 1984); Serlin, supra, 512 F. Supp. at 940, aff'd, 664 F.2d at 356; Intercontinental Packaging Co., supra, 348 N.W.2d at 335.

> accomplished solely through private agreement, and our decision, therefore, is governed by Midcal rather than by Rice v. Norman Williams Co., 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). Indeed, to hold otherwise is to forbid states from authorizing resale price maintenance, the anticompetitive effect of which is the subject of great controversy, . . . but to allow them to authorize horizontal price fixing, about which all agree.

745 F.2d at 179 (citation omitted).

CONCLUSION

The Ninth Circuit, following the established precedents of this Court, correctly determined (1) the OLCC's regulations mandate a hybrid price exchange and stabilization scheme in per se conflict with of § 1 of the Sherman Act, and (2) the regulations are not immunized by the state action doctrine. The courts do not need additional guidance on these issues. The decision below does not conflict with any opinion that relies on Midcal or post-dates Fisher.

For all the reasons stated above, the Court should deny the petition for a writ of certiorari or, alternatively, summarily affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT

By _____
THOMAS M. TRIPLETT
Counsel of Record
DAVID W. AXELROD
PATRICIA ANN HAIM
Attorneys for Respondents Elsie Viola Miller and Oretta Bernice Lancaster, dba the Junction Cafe and Tavern; Taylor's Coffee Shop, Inc., dba Rennie's Landing; WIAN, Inc., dba Barney's Cable; individually and as representatives of others similarly situated

APPENDIX

EXCERPT OF MEMORANDUM
OF THE ATTORNEY GENERAL OF OREGON

BEFORE THE OREGON LIQUOR CONTROL COMMISSION

In the Matter of the Amendment of Rules 10-080, 10-105 and 10-210, regarding minimum beer and wine prices and sales below cost.	)))))))	MEMORANDUM

This memorandum deals with price-fixing, a name for any number of mechanisms which operate to deprive independent businessmen of the opportunity or motive to compete in an open market. Free and open competition provides a continuous incentive to improvement and innovation, and society's resources are directed toward and reward those enterprises which offer the highest quality and the most efficient means of production and distribution. Price-fixing results in a lessening of competitive drive and introduces inefficiency. At its worst it discourages innovation and subsidizes poor products,

bad service and incompetent businessmen, who would not survive if forced to depend on business they could generate in a competitive marketplace.

Price-fixing cheats the consumer, and this simple economic fact has been recognized in federal law since 1890, 15 U.S.C. §1, et seq., the Sherman Act. Oregon Laws 1975, ch 255, enacted in 1975 is almost identical to the 85-year old Sherman Act. It declares a basic policy of free and open price competition by prohibiting all combinations in restraint of trade.

This law (and the Sherman Act) require very careful scrutiny of price regulation by state agencies. Only where there is a very clear mandate from the legislature will agency price-fixing withstand an antitrust challenge.

Through its administrative rules the OLCC currently fixes minimum wholesale

prices for beer and wine. The rule prohibits wholesale and retail sales of malt beverages and wine below "cost" and quantity discounts are prohibited at the wholesale level. Price posting in advance of price changes is required of wholesalers. The Petition sets forth proposed amendments to the rules designed principally to do three things:

(1) Abandon Commission regulation of wholesale and retail prices.

(2) Limit information exchange between wholesalers to the minimum necessary to accomplish the Commission's statutory responsibilities.

(3) Permit cost justified quantity discounts by wholesalers.

MINIMUM PRICES AND SALES BELOW COST

This memorandum concludes that the OLCC has no authority to fix or otherwise stabilize wholesale or retail beer or wine prices.

* * *

ORS 471.705 et seq. provide the regulatory authority of the OLCC. The Commission is specifically empowered to fix prices of alcoholic liquor containing over 4% purchased from the Commission, but is granted no express authority to fix the prices of beer and wine sold by others. The statutory language in this chapter is broad. But the legislature has not authorized price control, a regulatory tool well known to the legislature and expressly authorized for other commodities and services.

* * *

In any event, in 1975 the legislature repealed ORS 646.100 and enacted the state Antitrust Law. in doing so, the legislature declared a general policy of open price competition. With no direct authorization for the Commission to set minimum prices, there is no reason to believe the legislature intended beer and

wine sellers to be protected from ordinary market forces or that wholesalers or retailers were to be deprived of the right to independently make nondiscriminatory pricing decisions. On the contrary, the state's Antitrust Act recognizes the benefits of free and open price competition and establishes the law of the state in that regard. [Footnote omitted.]

INFORMATION EXCHANGE

The existing price posting rule is designed to give wholesalers a 10 day period in which to react to their competitors' publicly announced pricing intentions. As a practical matter this permits a wholesaler to announce a price change and then retreat if his competitors do not follow suit. By this means wholesalers can "agree" on future prices without meeting or discussing prices. If such information were exchanged privately by competitors and any stabilizing effect

on prices resulted, there would be a clear violation of the Sherman Act of the Oregon Antitrust Act. U.S. v. Container Corp. of America, 393 U.S. 333 (1939).

Without legislative authority for causing a price stabilizing exchange of information, the Commission stands in the same position as it does on direct price control. However, the Commission does have arguable need to receive price information so that it can enforce ORS 471.465 and 470, which prohibit retailer financial assistance in a variety of forms. The Petitioner's proposed rule would meet this need without requiring wholesalers to announce in advance their pricing intentions. Price changes would be reported after they took place for each month in which a change occurred. To the extent that the reported prices suggested a violation of statute or rule, the Commission would be in a position to make a

prompt investigation. But, by requiring reporting after the fact, some degree of normal price competition could be left in the market. Price reporting is a reasonable substitute for price posting which can serve the Commission's purposes without unduly interfering with normal competitive pricing strategy.

QUANTITY DISCOUNTS

Rule 210 currently prohibits quantity discounts and requires that "All price postings shall be consistent as between the various packages and containers offered for sale." Quantity discounts and varying prices among container sizes and types are legitimate pricing policies practiced almost universally in our economy. They often reflect very real cost differences involved in handling, ordering and billing by wholesalers. Obviously it costs a wholesaler less to deliver 50 cases to one customer than to deliver 5 cases to 10

customers. He has a legitimate cost reason to offer his customers a quantity discount, or to separately state handling and delivery charges on a per order basis.

If this legitimate reflection of cost differences is prohibited by the Commission the result is an artificial surcharge against the volume customer. Moreover, customers have no incentive to order in quantity and thereby permit the wholesaler to improve his productivity.

Economics aside, however, the Commission has no statutory authority to interfere with wholesalers' independent pricing decisions. The commission may enforce ORS 471.465 which prohibits "gratuities or rebates". But a cost justified quantity discount is neither. Obviously, if a difference in price is cost based it is not a gratuity. It is no gratuity to receive a 6 pack for $1.59 from

a seller who charges $.30 for single bottles.

* * *

The overall intent of ORS 471.465, is consistent with the conclusion that uniform quantity discounts are not prohibited. ORS 471 takes a number of precautions to insure that retailers remain independent from their suppliers, including prohibiting suppliers from rendering gifts, rebates, financing or more than nominal services to retailers. Personal ties are discouraged as well. ORS 471.457 and 463. The legislature was obviously intent on prohibiting any form of financial assistance by suppliers from influencing the business decisions of retailers. Federal law is similar in outlawing the so-called "tied house", by prohibiting, among other things, "furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs,

supplies, money services or other things of value." (with certain exceptions). 27 USC §205 (b). But neither statute is aimed at restricting legitimate, uniform, cost based pricing decisions. Neither statute was designed to subsidize small purchasers. And the federal law has been so interpreted by the Bureau of Alcohol Tax and Firearms. ATF Ruling 75-12 states in part:

> ". . . discounts may be granted to introduce new products, close out discontinued lines, and pass on to retailers savings to the supplier as a result of volume purchases, etc., and as such are methods used to arrive at an agreed sales price. However, if the discount is such that it is in reality a subterfuge for granting financial assistance to a retailer or for any other proscribed purpose, the discount would constitute a 'gift' within the meaning of 27 U.S.C. 205(b)(3).
>
> "It is not the intent of the Bureau to interfere with industry members' prerogative to use discounts, rebates, etc., as legitimate pricing arrangements."

The Bureau will investigate a pricing arrangement further if it appears that it does not meet certain cost criteria; but clearly cost based quantity discounts are not prohibited.

The Petitioner's proposed rule would permit uniform cost based quantity discounts as federal law now permits.

* * *

In conclusion, Petitioner urges the Commission to undertake a rulemaking proceeding and to adopt the foregoing proposed amendments. Petitioner desires the opportunity to express his views with respect to any and all proposed amendments advanced by other persons on this subject matter, and to be notified of all actions

taken by the Commission with respect to the attached petition.

Respectfully submitted

LEE JOHNSON
Attorney General

[signature]
Alvin Alexanderson
Assistant Attorney General
Of Attorneys for Petitioner

==========

EXCERPT OF OREGON ATTORNEY GENERAL'S REPORT
MARCH 2, 1978

* * *

Stabilization of Beer and Wine Prices[1]

The OLCC has no statutory control over prices of beer and wine (with one minor exception discussed below). Nevertheless the agency has adopted a number of rules designed purposely to raise and stabilize wholesale beer and wine prices. The so-called "price posting" rules require beer and wine wholesalers to post their

---

[1]Footnotes omitted.

prices publicly with the Commission and to post any changes 10 days in advance. This gives wholesalers ready access to all their competitor's [sic] current and even future prices, information which most businessmen consider highly confidential. Such exchanges of information have long been held to constitute illegal price fixing because of the stabilizing effect they have on the market. U.S. v. Container Corp. of America, 393 U.S. 333 (1969).

In 1976 the Attorney General requested the OLCC to repeal several of its price stabilizing rules including the advance posting requirement. The request was granted in part and denied in part. In opposition to that request the Oregon Beer and Wine Distributors Association made its position and the real effect of the rule clear in a letter to the Commission.

> "The association maintains that a prior approval to price posting (changes in price) should

> be required for the control factor to maintain stability in the market."

The second most important price stabilizing device used by the OLCC is its 180 day "post off" rule, OAR 845-10-210(1)(d), (2)(d). This rule prohibits beer and wine wholesalers from reducing their prices unless they keep the lower price in effect for 180 days (30 days for wine and there is an exception for industry-wide cost increases). This prohibits manufacturers from offering short term promotional discounts designed to introduce customers to a product they wouldn't try without a price concession. And it makes it very risky for a wholesaler to experiment with lowering prices, as he may be stuck with a low price which doesn't pay for itself in increased sales. The OLCC has no statutory authority to inhibit price reductions, and no public health or safety justification for doing so.

Another OLCC rule designed to limit price competition is OAR 845-10-210 (1)(a) and (2)(a). This rule prohibits quantity discounts, and again the Commission has no statutory authority to do so. The Attorney General proposed eliminating this rule in 1976, but it was retained. A letter from the industry at the time explained its purpose and effect. Permitting quantity discounts according to the Oregon Independent Retail Grocers Association ". . . would lead to retail price wars on beer and wines, which would, in [its] opinion, destroy the purpose of the Oregon Liquor Control Rules and Regulations."

* * *

6. OAR 845-10-211 establishes a delivered price system from wholesaler to retailer. This permits a retailer to pick up beer and wine in his own vehicles, but not to achieve any cost saving for doing so. Delivered prices are a common price

stabilizing mechanism. Preventing separately stated delivery charges simplifies price comparison and often results in economic waste as neither wholesaler nor retailer has any incentive to minimize delivery distances.

* * *

Through all of these rules and statutes the OLCC restricts competition among businessmen in this industry. Arguments can be advanced that these anticompetitive policies result in health safety or moral benefits to society. But a closer look reveals that the pressure to maintain these rules comes not from people concerned with public health and safety, but from established businessmen concerned with profits who want "stabilized" prices and protection from "price wars." There is clearly a cost to the consumer and a benefit to the sellers of this reduced price competition.

==========

EXCERPT OF STAFF SUNSET REVIEW
OREGON LIQUOR CONTROL COMMISSION
PREPARED PURSUANT TO CHAPTER 842
OREGON LAWS 1977
LEGISLATIVE RESEARCH, AUGUST 1978

* * *

Background. The Oregon Liquor Control Commission (OLCC) was established in 1933, following repeal of prohibition.

* * *

During the past decade, the OLCC has been the subject of numerous studies and investigations. While this review was being conducted, the agency was also under scrutiny by the state Attorney General; Executive Department, Personnel Division; a Governor's special commission; the City Club of Portland; and the media.

* * *

Primary Recommendation

Legislative Research recommends that the existing statute be allowed to expire and be replaced by a law modifying the

structure, authority, and role of the commission in regulating the liquor industry.

* * *

Certain laws and regulations impede competition beyond a level necessary for control of the industry and protection of the public health, safety, and welfare. This restriction of competition is accomplished in three ways: (1) the state liquor monopoly, (2) anti-competitive licensing criteria, and (3) price posting rules.

* * *

In order to achieve a level of regulation which will provide adequate control without unnecessary interference with private enterprise and competition, this report contains specific recommendations regarding:

(1) elimination of the state's monopoly on retail distilled liquor sales and creation of a

licensed private enterprise system of liquor outlets,

(2) retention, at least temporarily, of the state monopoly on wholesale sales of distilled liquor,

(3) elimination of the quota on dispenser licenses, and

(4) elimination of anti-competitive statutes and rules.

Because of the extent of change needed, we recommend a major revision of the statutes.

* * *

Price posting. Under OAR 845-10-210(1), wholesalers of malt beverages and wine must post their prices with the commission and notify it of price changes 10 days in advance. If the change in price is a decrease, the new price must remain in effect for a specified period: 180 days for malt beverages and 30 days for wine. According to the commission, the postings are required for the administration of the privilege tax. Requiring

advance disclosure limits price competition. The attorney general in his report to the Governor on the OLCC stated that the commission "has no statutory authority to inhibit price reductions, and no public health or safety justification for doing so." [Footnote omitted.] Legislative Research recommends that the commission repeal this rule, and establish a confidential reporting system to obtain the privilege tax information it requires.

* * *

Volume discounts. OAR 845-10-210(1)(a) and (2)(a) prohibit discounts by beer and wine wholesalers for volume purchases. There appears to be no statutory authority for this provision. Such discounts should serve to strengthen competition among wholesalers. Legislative Research recommends that the commission repeal this rule.